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In The
Supreme Court of the United States

JONATHAN K. SMITH,
A MEMBER OF THE SHINNECOCK INDIAN NATION
RESIDING ON THE SHINNECOCK INDIAN NATION
RESERVATION,

Petitioner,

v.

DOUGLAS SHULMAN,
IN HIS OFFICIAL CAPACITY AS
COMMISSIONER OF INTERNAL REVENUE,

Respondent,

SHINNECOCK INDIAN NATION,

Interested Party.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a "rebate" to a reservation Indian is income?

II. Whether a District Court is barred by statute from exercising subject matter jurisdiction, when an Indian treaty provides a free trade right and a procedural dispute resolution right?

III. Whether this Court should overturn *The Cherokee Nation v. The State of Georgia*, 30 U.S. 1 (1831) insofar as the case provides the legal underpinning of United States' jurisdiction over Indian reservations, where this Court interpreted the Commerce Clause language of "with" to mean "over" and found Indian tribes to be "domestic dependent nations" rather than "foreign nations," an error in Constitutional interpretation and a historical wrong against Native Americans?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW AND CORPORATE DISCLOSURE STATEMENT

Petitioner

Petitioner is Jonathan K. Smith, a reservation member of the Shinnecock Indian Nation, was the Plaintiff in the District Court and Appellant in the United States Court of Appeals for the Second Circuit. Petitioner is not a publicly owned corporation or subsidiary or affiliate of a publicly owned corporation.

Respondent

Respondent is Douglas Shulman in his official capacity as Commissioner of Internal Revenue. Douglas Shulman was automatically substituted for former Commissioner Mark W. Everson as party to this case in the Second Circuit. Respondent was the Defendant in the District Court. Respondent is not a publicly owned corporation or subsidiary or affiliate of a publicly owned corporation.

Interested Party

The Shinnecock Indian Nation, an interested party, is Petitioner's Tribe.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a Writ of Certiorari to review the judgment in this case by the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit Court of Appeals reversed the District Court's denial of Petitioner's motion for a preliminary injunction on February 22, 2008. The District Court's Order dismissing Petitioner's Complaint was issued on March 21, 2008. The Second Circuit Court of Appeals Decision was issued on June 17, 2009. An Order derying rehearing *en banc* was issued on August 4, 2009.

STATEMENT OF JURISDICTION

The Second Circuit Court of Appeals entered its judgment on June 17, 2009, and denied a timely filed petition for rehearing *en banc* on August 4, 2009. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. 1254(1).

TREATY, CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following treaty, constitutional, and statutory provisions, which are reproduced in the Appendix at App F at App. 32 *et. seq.*:

A. *The Fort Albany Treaty, 1664*
B. The Commerce Clause
C. The Cases and Controversies Clause
D. NYS Colony Clause
E. 26 U.S.C. § 6320(c)
F. 26 U.S.C. § 6330(d)(1)
G. 26 U.S.C. § 7421(a) (Tax Anti Injunction Act)
H. 26 U.S.C. § 7422(a)
I. 28 U.S.C. § 2201 (Declaratory Judgment Act)

STATEMENT OF THE CASE AND FACTS

Petitioner's Tribe, the Shinnecock Indian Nation, is an aboriginal self-governing people, which has continuously dwelled on what is now known on Long Island, New York, since at least 1000 B.C. Today, after a series of purported land transfers to the founders of the Town of Southampton, New York, beginning in 1640 and ending with a legislative act of the New York State Legislature in 1859, the Shinnecock Indian Nation occupies what is now known as the Shinnecock Indian Reservation, located within the territorial boundaries of the Town of Southampton.

On February 23, 2006, a Complaint was filed in the United States District Court for the Eastern District of New York, by Petitioner, seeking a declaratory judgment against Everson, to invalidate Everson's one hundred twenty-eight thousand, six hundred fourteen dollars and eighty-six cents ($128,614.86) in assessment, penalties, interest, and collection of alleged underreporting of federal income

tax as to Petitioner's on-reservation rebates as "income" for the tax year 2000. Petitioner first attempted to resolve the issue with the IRS through an administrative due process hearing, but failed.

The Complaint alleges the federal income tax assessment on "rebates" and collection efforts were, and are, invalid, as: 1) improper notice of alleged underreporting; 2) in violation of the free trade guarantee of The Fort Albany Treaty, 1664; 3) in violation of the grant of power by Congress pursuant to section 7801 of the Internal Revenue Code, 4) in violation of the policy of Congress concerning Indians; and 5) in violation of the role of the federal government as trustee and guardian of Petitioner.

After the Complaint was filed, and shortly before Everson filed a motion to dismiss, Everson took further collection action by filing a notice of federal tax lien against Petitioner in Riverhead, Suffolk County, New York, which prompted Smith's filing of a motion for preliminary injunction. The District Court denied Petitioner's motion in a minute entry without any explanation, Petitioner filed an interlocutory appeal, and the Second Circuit reversed and remanded.

The District Court then granted the motion to dismiss filed by Respondent, and dismissed the Complaint for lack of subject matter jurisdiction. There were no findings of fact in the District Court record as instructed in the Second Circuit Mandate, and there was no determination that the rebates were "income." App. 23. The dismissal was upheld by the Second Circuit on the basis of lack of subject

matter jurisdiction under 26 U.S.C. § 6320(c), 26 U.S.C. § 6330(d)(1), 26 U.S.C. § 7421(a) (Tax Anti Injunction Act), 26 U.S.C. § 7422(a), and 28 U.S.C. § 2201 (Declaratory Judgment Act), and a rehearing was denied.

REASONS FOR GRANTING THE WRIT

This case presents federal issues of national and historical importance to the United States and Indian Tribes, giving this Court an opportunity to right a historical wrong against Native Americans, not unlike the abolition of slavery during the Civil War and this Court's repudiation of the subsequent separate but equal racial doctrine over a century later.

I. Reservation rebates are not income for federal income tax purposes.

The District Court, and the Second Circuit assumed without comment, without any legal support or finding of fact, that a rebate was synonymous with income. This was error. Any analysis of income tax jurisdiction must rest upon a factual finding of income, which is lacking in this case. This point was raised, but unaddressed in the courts below. This has national significance for taxation of Reservation Indians. This Court should reverse and remand this action for a finding of fact in the District Court as to whether an on-reservation rebate is income for federal income tax purposes.

II. Petitioner's Treaty provides a right to free trade and a dispute resolution mechanism under which District Courts have subject matter jurisdiction.

On September 24, 1664, the Crown of England, and the newly established Province of New York established that same year, entered into the Treaty with New York Indians at Fort Albany. *The Fort Albany Treaty, 1664*, ("Articles between Col. Cartwright and the New York Indians", *Documents Relative to the Colonial History of the State of New York*, III, pp. 67-68) ("the Treaty"). This peace treaty guaranteed, among other things, free trade to the Indians. App. 34.

Article 4 of the treaty provides:

> The Indians at Wamping and Espachomy and all below the Manhatans, as also all those that have submitted themselves under the proteccôn of His Matie are included in these Articles of Agreement and Peace;

Appended Article 3 to the treaty provides:

> That they may have free trade, as formerly.

The Shinnecock had so submitted themselves under the protection of the English Crown prior to the date of the treaty. Therefore, the Shinnecock are included in the treaty under Article 4, and enjoy the

free trade guarantee provided to the Indians by Appended Article 3.

Paragraph 2 of the Treaty, at App. 32, invoked by Plaintiff provides a dispute resolution procedural right for which the District Court may exercise subject matter jurisdiction:

> That if any English Dutch or Indian (under the proteccon of the English) do any wrong injury or violence to any of ye said Princes or their subjects in any sort whatever, if they complaine to the Governor at New Yorke, or to the Officer in Cheife at Albany, if the person so offending can be discovered, that person shall receive condigne punishmt and all due satisfaccon shall be given; and the like shall be done for all other English Plantations.

The standard for Indian treaty interpretation is to resolve in favor of Indians. As expressed by Chief Justice Warren in *Squire v. Capoeman*, 351 U.S. 1, 7 (1956) (Finding illegal the assessment of federal income taxes on timber sold by the federal government on behalf of Indians protected by treaty):

> "Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependant on its protection and good faith. Hence, in the words of Chief Justice Marshall, 'The language used in

> treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.' *Worcester v. The State of Georgia*, 6 Pet. 515, 582." *Carpenter v. Shaw*, 280 U.S. 363, 367.

In the case at bar, the underlying rationale of the courts below failed to consider Petition's argument. Rather, the courts ignored Petitioner's Treaty rights assertion and swept this action into non-Indian statutory schemes. The courts below cited no case law depriving the federal courts from exercising subject matter jurisdiction over a treaty dispute. This action should not be treated differently simply because the treaty dispute involves income.

The Treaty is within the meaning of "Treaties made" under the jurisdictional grant of power to the federal courts under U.S. CONST. art. III, § 2, Cl. 1, at App. 35, and the courts below cited no legal authority under which Congress may validly deprive the federal courts of jurisdiction to hear a treaty dispute. Additionally, this Treaty is binding on New York State under Art. I, § 14, of New York State's Constitution. App. 35.

This Court should enforce the duty of the federal courts to exercise its jurisdiction to hear treaty disputes, and reverse and remand this case to the District Court.

III. The first Supreme Court case involving an Indian Tribe party, upon which United States' jurisdiction over Indian Tribes rests, *The Cherokee Nation v. The State of Georgia*, 30 U.S. 1 (1831), finding Indian tribes to have a legal status of "domestic dependent nations" rather than "foreign nations," was contrary to the plain meaning of the Constitution and should be reversed.

This Court has not had an opportunity to right such a historical wrong done to a people by the government of the United States since the abrogation of the holding that slaves are constitutionally protected property of citizens in *Scott v. Sandford*, 60 U.S. 393 (1856) after the Civil War by the Thirteenth and Fourteenth Amendments, and nearly one hundred years later, the repudiation of the "separate but equal" racial doctrine holding in *Plessy v. Ferguson*, 163 U.S. 537 (1896) by this Court in *Brown v. Board of Eduction*, 347 U.S. 483, 494-495 (1954).

The imposition of a federal income tax on reservation Indians is unconstitutional, and in violation of human rights treaty obligations of the United States.

Unconstitutional as exceeding Congress' power under Article I, Section 8, Clause 3 of the Constitution of the United States ("To regulate Commerce with foreign Nations, and among the

several States, and *with* the Indian Tribes.") [emphasis added]. App. 35. *i.e.* This section has plain meaning: "*with*"- not "*over*". *The Cherokee Nation v. The State of Georgia*, 30 U.S. 1 (1831) should be overturned insofar as the case provides the jurisdictional underpinning of subsequent Congressional regulation of on-reservation Indians, because the case erroneously interpreted "with" to mean "over" and found Indian tribes to be "domestic dependent nations" rather than "foreign nations." *Cherokee Nation*, 30 U.S., at 17.

This would not be the first time this Court nullified a prior decision involving Native Americans. *See, United States v. Forty-Three Gallons of Whiskey*, 108 U.S. 491, 496 (1883) (Upholding application of treaty language and federal statute banning alcohol in ceded Indian territory over a general alcohol licensing statute ("The laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language. This rule operates with special force where a conflict would lead to the abrogation of a stipulation in a treaty making a valuable cession to the United States.").

This Court in *Forty Three Gallons*, 108 U.S. at 497-498, specifically and unequivocally nullified as precedent *Cherokee Tobacco Tax*, 11 Wall. 616 (1871), a post civil war case with an opposite holding, which applied a general federal tobacco excise tax on-reservation over a contrary treaty stipulation, decided twelve years earlier. ("The case of the *Cherokee Tobacco Tax*, 11 Wall. 616, cannot be treated as authority against the conclusion we have

reached. The decision only disposed of that case, as three of the judges of the court did not sit in it and two dissented from the judgment pronounced by the other four.")

Not only does the United States' Indian treaty and regulatory schemes violate the U.S. Constitution, but the Office of the High Commissioner for Human Rights, Committee on the Elimination of Racial Discrimination, recently issued concerns and recommendations directed to the United States with regard to land issues involving the Western Shoshone Tribe. (A/56/18, para. 400, adopted on 13 August 2001) The failure of the United States to respond triggered further U.N. action. (Early Warning and Urgent Action Procedure, Decision 1(68), adopted on 8 March 2006) The United States has failed to respond as of this date. (U.N. High Commissioner for Human Rights letter to United States, 18 August 2006 and 9 March 2007) The Commissioner condemned the status of Indian Tribes as "domestic dependent nations" and Indian treaties that could be unilaterally terminated by the United States.

The United States is increasingly isolated in the world community. On the 13th of September, 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples, by a vote of 143 in favor, 4 against, and 11 abstaining. The only 4 voting against the Declaration are all former colonies of Great Britain with large native populations, including the *United States*.

Genocide, like slavery, is problematic. That is why this Court has struggled with Indian cases over the years.

This Court should overturn *Cherokee Nation* and hold that the Constitution limits Congressional power to regulating commerce *with* Indian Nations, and the imposition of a federal income tax on Reservation Indians is unconstitutional.

CONCLUSION

This Court should enforce what the Constitution plainly stated over two hundred years ago about Indian Tribes and limiting Congressional power. What the Constitution plainly stated then, is consistent with today's voice of the world community.

Respectfully submitted,

/s/

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October 28, 2009

[ENTERED: June 17, 2009]

08-1896-cv
Smith v. Shulman

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 17th day of June, two thousand and nine.

Present:

HON. ROGER J. MINER
HON. RICHARD C. WESLEY
Circuit Judges,
HON. TIMOTHY C. STANCEU,
*Judge.**

JONATHAN K. SMITH, A MEMBER OF THE SHINNECOCK INDIAN NATION RESIDING ON THE SHINECOCK INDIAN NATION RESERVATION,
Plaintiff-Appellant,

-v.- No. 08-1896-cv

DOUGLAS SHULMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF INTERNAL REVENUE,
*Defendant-Appellee,***

SHINNECOCK INDIAN NATION,
Interested Party.

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* The Honorable Timothy C. Stanceu, United States Court of International Trade, sitting by designation.

** Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Commissioner of Internal Revenue Douglas Shulman is automatically substituted for former Commissioner Mark W, Everson as party to this case.

For Plaintiff-Appellant: SCOTT MICHAEL MOORE, New York, N.Y.

For Appellee: MARION E.M. ERICKSON (Nathan J. Hochman, Thomas J. Clark, *on the brief*), Tax Division, Department of Justice, Washington, D.C.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the district court's judgment of dismissal be **AFFIRMED**.

Plaintiff-appellant Jonathan K. Smith ("Smith") appeals from the March 21, 2008 judgment of the United States District Court for the Eastern District of New York (Feuerstein, J.), dismissing for lack of subject matter jurisdiction a complaint against the defendant-appellee United States Commissioner of Internal Revenue. In the complaint, Smith sought a refund, injunctive relief, and a declaration that the Internal Revenue Service ("IRS") illegally assessed taxes, penalties, and interest on income that Smith, a member of the Shinnecock Indian Nation, earned on the Shinnecock Indian Reservation in tax year 2000.

Smith alleges that he first learned of the IRS's intention to assess taxes and penalties when he received a back-up withholding notice dated January 21, 2005 from a third party informing him that twenty-eight percent would be withheld on all cash

payment of dividends, interest, and original issue discount income in accordance with 26 U.S.C. § 3406(a)(1)(c). Smith also contends that he received his first notice of the $128,624.86 assessment from the IRS on June 11, 2005. Smith filed an objection with the IRS on June 13, 2005, contending that he had received no notice of the assessment and that the relevant income was not subject to income tax. Smith requested a collection due process hearing, which was held and decided in favor of the IRS. The appellee argues that the present action properly should have been brought in United States Tax Court as an appeal from the due process hearing pursuant to 26 U.S.C. § 6330(d) and that the district court therefore did not err in dismissing the complaint for lack of subject matter jurisdiction. We review a dismissal for lack of subject matter jurisdiction de novo. *See Luckett v. Bure*, 290 F.3d 493, 496 (2d Cir. 2002).

Insofar as Smith is attempting to appeal the adverse decision of the due process hearing officer, including the hearing determination on the issue of notice, Smith's recourse was to appeal to the United States Tax Court, which has exclusive jurisdiction over such matters. 26 U.S.C. §§ 6320(c), 6330(d)(1). With respect to a claim for refund of income tax paid, Smith was statutorily required to file an administrative claim and pay the tax in full prior to filing suit in the district court. 26 U.S.C. § 7422(a); *Flora v. United States*, 362 U.S. 145, 175-77 (1960). Smith's attempt to obtain an injunction against IRS collection of income tax is barred by the Tax Anti-Injunction Act, and Smith has not demonstrated that there are no circumstances under which the

government could prevail in this action and that equity jurisdiction otherwise exists. 26 U.S.C. § 7421(a); *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962). The Declaratory Judgment Act likewise prevented the district court from issuing declaratory relief. 28 U.S.C. § 2201. Finally, we cannot say that the district court abused its discretion in denying Smith's motions to amend the complaint because amendment would not have cured the jurisdictional defects.

Accordingly, the judgment of the district court dismissing the action for lack of subject matter jurisdiction is hereby **AFFIRMED**.

For the Court
Catherine O'Hagan Wolfe, Clerk

By: */s/* Frank Perez

[ENTERED: March 21, 2008]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
_____X

JONATHAN K. SMITH, a member of the Shinnecock Indian Nation residing on the Shinnecock Indian Nation Reservation,

Plaintiff,

-against-

ORDER
CV-06-0791
(SJF)(AKT)

MARK W. EVERSON, in his official capacity as Commissioner of Internal Revenue,

Defendant.

_____X

FEUERSTEIN, J.

On February 23, 2006, plaintiff Jonathan K. Smith (plaintiff) filed a complaint against Mark W. Everson, in his official capacity as Commissioner of Internal Revenue (defendant), seeking, *inter alia*, judgment declaring invalid defendant's assessment of taxes, penalties and interest on income earned purportedly on the Shinnecock Indian reservation for the year 2000. Presently pending before this Court are: (1) defendant's motion to dismiss the complaint pursuant to Rule 12(b)(1), (5) and (6) of the Federal Rules of Civil Procedure; and (2) plaintiff's motions (a) to strike defendant's motion to

dismiss; (b) for a default judgment; (c) for leave to file an Amended Complaint; and (d) for a preliminary injunction, all of which are consolidated for the purpose of this Order. For the reasons stated herein, defendant's motion to dismiss is granted and plaintiff's motions are denied.

I. BACKGROUND

A. Factual Background

Plaintiff is a member of the Shinnecock Indian Nation. (Complaint [Compl.], ¶ 1).

On April 15, 2001, plaintiff filed a Form 1040 for off-reservation earned income for the year 2000. (Compl., ¶ 5).

According to plaintiff, a back-up withholding tax notice from FirstClearing, LLC, dated January 21, 2005, advised him that he was subject to twenty-eight percent (28%) backup withholding on all cash payment of dividends, interest and original issue discount income in accordance with Section 3406(a)(l)(c) of the Internal Revenue Code. (Compl., ¶ 6). On or about June 13, 2005, plaintiff filed an objection with the Internal Revenue Service (IRS) asserting that he had not received notices of any alleged underreporting and that, in fact, there had been no underreporting because on-reservation earned income is not subject to tax under The Fort Albany Treaty of 1664. (Id.).

According to plaintiff, a notice from the IRS, dated June 6, 2005, indicated that he owed taxes and

penalties for the year 2000 in the amount of one hundred twenty-eight thousand six hundred fourteen dollars and eighty-six cents ($128,614.86). (Compl., ¶ 7). Plaintiff alleges that he filed an objection to that notice on or about May 17, 2005.[1] (Id.).

An IRS notice of intent to levy dated June 11, 2005 was issued and, on or about January 25, 2006, after a collection duc process (CDP) hearing held at plaintiff's request, a determination was rendered in favor of the IRS and against plaintiff. (Compl. ¶ 8).

B. Procedural Background

On February 23, 2006, plaintiff filed a complaint against defendant alleging that defendant's assessment of tax on income earned by plaintiff on the Shinnecock Indian Reservation during the year 2000 is invalid as in violation of: (1) "the treaty guarantee of free trade under the terms of Article 4 and Appended Article 3 of The Fort Albany Treaty, 1664;" (2) "the grant of power by * * * Congress * * *, pursuant to Section 7801 of the Internal Revenue Code, to the United States Department of the Treasury, to administer and enforce the internal revenue laws of the United

[1] Plaintiff's dates seem implausible and suggest that he is being less than forthcoming regarding the dates he received notices from the IRS. According to the IRS, plaintiff was issued a notice of deficiency on January 27, 2003, a notice of delinquency in filing a return on the sixteenth (16th) week of 2004, and backup withholding notices on the twenty-sixth (26th), thirtieth (30th), thirty-fourth (34th), forty-third (43rd) and forty-seventh (47th) weeks of 2004. (Affidavit of Robert C. Green, dated September 14, 2006, ¶¶5 and 11).

States;" (3) "the policy of * * * Congress * * * concerning Indians;" and (4) "the role of the [federal] government * * * as trustee and guardian of [plaintiff]." (Compl., ¶ 9). Plaintiff seeks a declaratory judgment that the tax assessment, penalties and interest assessed on income he earned on the Shinnecock Indian reservation in the year 2000 is invalid and a refund on all backup withholding collected by defendant pursuant to the allegedly invalid tax assessment. (Compl., ¶¶ 10-11).

By summary order filed February 22, 2008, the United States Court of Appeals for the Second Circuit reversed my minute order from September 29, 2006 denying plaintiff's motion for a preliminary injunction enjoining the government's federal tax lien for a failure to comply with Rule 52(a) of the Federal Rules of Civil Procedure and remanded the matter to me for findings of fact and conclusions of law.[2]

II. DISCUSSION

A. Defendant's Motion to Dismiss

1. Subject Matter Jurisdiction

a. Standard of review

"In determining whether the federal courts have subject matter jurisdiction over a cause of action, a district court must look to the way the

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[2] In light of the Second Circuit's reversal and remand, plaintiff's motion to amend the minute order denying his motion for a preliminary injunction is denied as moot.

complaint is drawn to see if it claims a right to recover under the laws of the United States." IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1055 (2d Cir.1993) (quoting Goldman v. Gallant Securities, Inc., 878 F.2d 71, 73 [2d Cir.1989]). In considering a motion to dismiss for lack of subject matter jurisdiction, a court must accept as true all material factual allegations in the complaint. Atlantic Mut. Ins. Co. v. Balfour Maclaine Intern. Ltd., 968 F.2d 196, 198 (2d Cir. 1992). However, "[w]here jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits." See LeBlanc v. Cleveland, 198 F.3d 353, 355 (2d Cir. 1999). Plaintiffs have the burden of establishing that subject matter jurisdiction exists. Lunney v. United States, 319 F.3d 550, 554 (2d Cir. 2003).

b. Merits

Defendant contends that plaintiff's complaint is an appeal of the IRS Settlement Officer's determination following the CDP hearing and that 26 U.S.C. § 6330(d) vests exclusive jurisdiction over appeals from CDP hearings in the United States Tax Court when the underlying tax liability arises from an income tax.

26 U.S.C. § 6330(d) vests exclusive jurisdiction over determinations by the IRS assessing a tax deficiency with the United States Tax Court "if the Tax Court would have had jurisdiction to determine a deficiency involving the type of tax liability at issue in the collection proceeding." Patridge v. I.R.S.,

No. 06-1155, 205 Fed.Appx. 459, 461 (7th Cir. Nov. 13, 2006) (unpublished opinion); see also Barry v. United States, No. 06-12817, 215 Fed.Appx. 933,934 (11th Cir. Jan. 31, 2007) (holding that the Tax Court has exclusive jurisdiction over challenges to the IRS's CDP determination of an income tax liability). "It is axiomatic that the Tax Court has jurisdiction to review federal income tax deficiencies." Patridge, 205 Fed.Appx. at 461; see also Silver v. Smith, No. 02-6281, 70 Fed.Appx. 17, * 19 (2d Cir. June 27, 2003) (summary order) (holding that the Tax Court has jurisdiction with respect to those levies over which is has deficiency jurisdiction, specifically income, gift and estate taxes). Thus, district courts lack subject matter over petitions for judicial review of an IRS determination authorizing a collection action against a taxpayer which involves federal income taxes. See Patridge, 205 Fed.Appx. at 461; Voelker v. Nolen, 365 F.3d 580, 581 (7th Cir. 2004). In addition, the Tax Court generally has jurisdiction over "additions to tax for failure to pay those taxes," i.e. assessed penalties and interest, if the claims therefor were asserted by the IRS at or before the CDP hearing. See Patridge, 205 Fed.Appx. at 461.

Although plaintiff phrases his allegations in terms of violations of treaties, federal statutes and Congressional policy, the crux of plaintiff's dispute with defendant Commissioner of the IRS is clearly his income tax liability and, thus, the Tax Court has jurisdiction to consider such issues. See, e.g. Crawford v. Commissioner of Internal Revenue, 266 F.3d 1120, 1123 (9th Cir. 2001) (holding that Tax Courts have jurisdiction to consider constitutional questions in the context of deciding deficiencies);

Barry, 215 Fed.Appx. at 935 (holding that the mere allegation of a due process violation does not confer jurisdiction on the district court if the underlying dispute concerns income taxes). Plaintiff seeks a declaration that the tax assessment, penalties and interest assessed on income he earned in the year 2000 is invalid and a refund on all backup withholding collected by defendant pursuant to the allegedly invalid tax assessment. See, e.g. Voelker, 365 F.3d at 582 (finding that the plaintiff's dispute was over his income tax liability where he sought, *inter alia*, a declaration that his income tax liability was erroneously determined); Pesci v. United States, No. CV-S021307, 2003 WL 21456609, at * 2 (D.Nev. May 6, 2003) (holding that plaintiff's claim for a refund of paid taxes supports a finding that the Tax Court has jurisdiction because before a plaintiff may file in federal district court to recover any federal income tax alleged to have been wrongfully collected by the IRS, he must satisfy the jurisdictional prerequisites of making a full payment of the tax deficiency and exhausting his administrative remedies by filing a refund claim with the IRS). Absent exhaustion of his administrative remedies, which plaintiff has failed to allege[3] plaintiff's remedy, to the extend he seeks a refund, lies with the Tax Court.

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[3] Indeed, according to defendant, IRS records indicate that plaintiff has not, in fact, paid his tax liability for the year 2000. (See Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, p. 2 n. 1).

To the extent plaintiff is claiming procedural defects in the tax collection proceedings, those claims also must be brought in Tax Court. See, e.g. Patridge, 205 Fed.Appx. at 461 (holding that a case involving income taxes — even where procedural defects are alleged — must be brought in Tax Court); Silver, 70 Fed.Appx. at * 20 (holding that the Tax Court has jurisdiction to hear procedural as well as substantive challenges to matters within its jurisdiction).

In opposition, plaintiff, *inter alia*, cites the case Squire v. Capoeman, 351 U.S. 1, 51 S.Ct. 598 (1956), for the proposition that "[a] district court has found illegal the assessment of federal income taxes on timber sold by the federal government on behalf of Indians protected by treaty." (Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss [Plf. Opp.], p. 8). To the extent plaintiff cites to Squire to imply that Indians are protected from the assessment of federal income taxes, such a proposition is clearly contrary to law. See, e.g. Dillon v. United States, 792 F.2d 849, 852 (9th Cir. 1986) (holding that generally Indians, like other United States citizens, are subject to federal income taxation unless specifically exempted by treaty or statute). To the extent plaintiff cites Squire merely as an example of a case involving income taxes over which a district court had jurisdiction, Squire is inapposite, since Squire was an action for a refund of income taxes paid in which jurisdiction was not challenged. As noted above, federal district courts have jurisdiction over actions to recover any internal revenue tax alleged to have been wrongfully collected *provided that* the jurisdictional

prerequisites of making a full payment of the tax deficiency and exhausting administrative remedies are met. Cf. Pesci, 2003 WL 21456609, at * 2. Since plaintiff has not established that he made full payment of the tax deficiency or exhausted his administrative remedies, this Court does not have jurisdiction over his claim for a refund. Notably, cases similar to plaintiff's, which challenge deficiencies and additions to tax assessed by the Commissioner of the IRS based on one's status as an Indian, are routinely heard in the Tax Court. See, e.g. Dubray v. C.I.R., No. 7547-02, 2004 WL 2849173 (U.S. Tax Ct. Dec. 13, 2004); Kieffer v. C.I.R., No. 9404-96, 1998 WL 281900 (U.S. Tax Ct. June 2, 1998), aff'd, 194 F.3d 1317 (9th Cir. 1999); Campbell v. C.I.R., No. 9244-95, 1997 WL 690178 (U.S. Tax Ct. Nov. 6, 1997); Beck v. C.I.R., No. 11689-92, 1994 WL 100623 (U.S. Tax Ct. Mar. 28,1994), aff'd, 64 F.3d 655 (4th Cir. 1995); Satiacum v. C.I.R., Nos. 469-77, 16540-80, 1986 WL 21558 (U.S. Tax Ct. Aug. 6, 1986). Accordingly, plaintiff's complaint is dismissed for lack of subject matter jurisdiction.[4]

B. Standard for Injunctive Relief

In order to obtain a preliminary injunction in non-tax cases, a plaintiff must demonstrate (1) a likelihood of irreparable injury in the absence of injunctive relief; (2) either a likelihood of success on the merits, or "sufficiently serious questions going to

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[4] In light of this determination, I am constrained from addressing defendant's remaining contentions. Moreover, since lack of subject matter jurisdiction may be raised at any time, plaintiff's motion to strike defendant's motion to dismiss as untimely and for a certificate of default are denied.

the merits to make them a fair ground for litigation" and a balance of hardships tipping decidedly in the plaintiff's favor. Malletier v. Burlington Coat Factory Warehouse Corp., 426 F.3d 532, 537 (2d Cir. 2005); Sunward Electronics, Inc. v. McDonald, 362 F.3d 17, 24 (2d Cir. 2004).

In tax cases, the Anti-Injunction Act, 26 U.S.C. § 7421(a), generally prohibits any action "for the purposes of restraining the assessment or collection of any tax." "[A] pre-enforcement injunction against the assessment or collection of taxes may be granted only (i) if it is clear that under no circumstances could the Government ultimately prevail * * * and (ii) if equity jurisdiction otherwise exists * * *. Unless both conditions are met, a suit for preventive injunctive relief must be dismissed." Alexander v. "Americans United" Inc., 416 U.S. 752, 758 (1974) (internal quotations and citations omitted).

In light of my determination that this Court lacks subject matter jurisdiction over plaintiff's claims, plaintiff cannot demonstrate a likelihood of success on the merits of his claim for injunctive relief or that "under no circumstances could the Government ultimately prevail." Plaintiff's attempt to invoke section 6213(a), one of the enumerated exceptions in the Anti-Injunction Act, does not cure the defect in subject matter jurisdiction. Indeed, that exception specifically notes that injunctive relief is available "in the proper court, including the Tax Court." Accordingly, plaintiff's motion for a preliminary injunction is denied.

C. Motions for Leave to File an Amended Complaint

"If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). Fed. R. Civ. P. 15(a) provides that leave to amend a complaint "shall be freely given when justice so requires." Id. Absent a showing of undue delay, bad faith or dilatory motive on the part of the plaintiff, undue prejudice to the defendant, or the futility of the amendment, a plaintiff should be granted leave to replead upon granting a motion to dismiss. Id. at 182, 83 S. Ct. 227; Dluhos v. Floating and Abandoned Vessel Known as "New York,", 162 F.3d 63, 69 (2d Cir. 1998) (holding that a motion to amend should be denied if there is an "apparent or declared reason—such as undue delay, bad faith or dilatory motive * * * repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of an amendment, [or] futility of the amendment"). If amendment would be futile, i.e. if it could not withstand a motion to dismiss pursuant to Rule 12(b)(6), leave to amend may be denied. See Lucente v. International Business Machines Corp., 310 F.3d 243, 258 (2d Cir. 2002). Moreover, "[w]here a court would lack subject matter jurisdiction over the case as pleaded in the proposed amendment, the court may deny leave to amend on the ground off futility." Latino Quimica-Amtex S.A. v. Akzo Nobel Chemicals B.V., No. 03 Civ. 10312, 2005 WL 2207017, at * 4

(S.D.N.Y. Sept. 8, 2005) (citing Chan v. Reno, 916 F.Supp. 1289, 1302 (S.D.N.Y. 1996)).

Plaintiff has filed two (2) motions to amend his complaint. The "First Amended Complaint" proposed by plaintiff claims, in addition to the claims asserted in his original complaint, that defendant's assessment of tax, penalties and interest on income plaintiff earned on the Shinnecock Indian Reservation during the year 2000, and subsequent collection efforts, was in bad faith and "for the improper non-tax purpose of harassment and to coerce [plaintiff] from asserting his treaty rights in unrelated [actions commenced by plaintiff in state and federal courts] involving the [then] New York State Attorney General, Eliot Spitzer, * * *. (Proposed First Amended Complaint [First Amend. Compl.], ¶ 10). Thus, the crux of plaintiff's "First Amended Complaint" is his income tax liability, as the only relief sought by him is a declaration that the tax assessment and additions thereto are invalid, a refund, and injunctive relief. Accordingly, any amendment would be futile, since this Court would lack subject matter jurisdiction over plaintiff's additional claim. See, e.g. Voelker, 365 F.3d at 582 (finding that the plaintiff's dispute was over his income tax liability where he sought, *inter alia,* a declaration that his income tax liability was erroneously determined). Thus, plaintiff's motion for leave to file a First Amended Complaint is denied.

Plaintiff's second motion for leave to file an "Amended Complaint" seeks to assert the following additional allegation: that defendant's assessment of income tax and additions thereto violated the United

Nations' International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the U.N. General Assembly Dec. 21, 1965, 660 U.N.T.S. 195 (ratified by the United States June 24, 1994) ("CERD"). (Proposed Second Amended Complaint ¶ 11). As the crux of plaintiff's "Amended Complaint" is his income tax liability, and he seeks the same relief, the proposed amendment would be futile, as this Court lacks subject matter jurisdiction. In addition, CERD does not provide a private right of action. See Smith v. Cuomo, 06-CV-3181 at 35 (E.D.N.Y. Sept. 30, 2007). Accordingly, plaintiff's second motion for leave to file an "Amended Complaint" is denied.

III. CONCLUSION

For the foregoing reasons, defendant's motion to dismiss the complaint is granted and the complaint is dismissed in its entirety for lack of subject matter jurisdiction; plaintiff's motions to strike defendant's motion to dismiss, for a default judgment, and to amend my September 29 2006 order are denied as moot; and plaintiff's motions for leave to file an amended complaint and for a preliminary injunction are denied. The clerk of the Court is directed to enter final judgment in favor of defendant and to close this case.

SO ORDERED

/s/ Sandra J. Feuerstein
SANDRA J. FEUERSTEIN
United States District Judge

Dated: March 21, 2008
Central Islip, New York

Copies to:

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New York, New York 10111
Attn: Scott Michael Moore, Esq.

United States Department of Justice
Tax Division
P.O. Box 55
Ben Franklin Station
Washington, D.C. 20044
Attn: Karen A. Smith
Bonni Jessica Perlin

[ENTERED: February 22, 2008]

06-4686-cv	06-cv-0791
Smith v. Everson	E.D.N.Y.
	Feuerstein, J.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 22nd day of February, two thousand and eight.

PRESENT: HON. RICHARD J. CARDAMONE,
HON. SONIA SOTOMAYOR,
HON. REENA RAGGI,
Circuit Judges.

JONATHAN K. SMITH,

Plaintiff-Appellant,

-v.- No. 06-4686-cv

MARK W. EVERSON,

Defendant-Appellee.

FOR APPELLANT: Scott Michael Moore,
Moore International Law
Offices, P.C.,
New York, NY.

FOR APPELLEE: Thomas J. Clark, Tax Division, Department of Justice; (Eileen J. O'Connor, Assistant Attorney General; Marion E.M. Erickson, Attorney, Tax Division, Department of Justice; and Roslynn R. Mauskopf, United States Attorney for the Eastern District of New York; *on the brief*), Washington, D.C.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the interlocutory appeal is REVERSED and REMANDED with instructions.

Plaintiff-appellant Jonathan K. Smith appeals from the September 29, 2006 minute order entry of the United States District Court for the Eastern District of New York (Feuerstein, J.), denying his application to preliminarily enjoin collection on the government's federal tax lien. We presume the parties' familiarity with the underlying facts and procedural history of the case.

We review the grant or refusal of interlocutory injunctive relief for abuse of discretion. *See Coca-Cola Co. v. Tropicana Prods., Inc.*, 690 F.2d 312, 315 (2d Cir. 1982) (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975)). "An abuse of discretion may consist of an error of law, an error of fact, or an error in the substance or form of the trial court's order."

Id.; see also Lusk v. Village of Cold Spring, 475 F.3d 480, 484 (2d Cir. 2007).

Rule 52(a) of the Federal Rules of Civil Procedure requires district courts to "state the findings [of fact] and conclusions [of law]" when granting or refusing an interlocutory injunction. Fed. R. Civ. P. 52(a)(2); *see also Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940). There was no court reporter present during argument for the preliminary injunction motion at issue, and the minute entry offers no findings of fact or determinations of law from which this Court can discern which of the government's alternative legal theories (or some other) the district court relied upon in denying the motion. *See Rosen v. Siegel*, 106 F.3d 28, 32 (2d Cir. 1997) (stating that "absent explicit findings, we lack a clear understanding of the ground or basis of the decision of the trial court.") (internal quotation marks omitted). Moreover, because our review of questions of can turn on the district court's application of the law to the facts, it is imperative that the record below establish a sufficient factual predicate for us to determine whether that application by the district court was proper.[1]

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[1] We also note that there is a motion to dismiss pending in this case before the district court, which implicates many of the same legal issues as the preliminary injunction motion. We think judicial efficiency might be better served if the district court considered consolidating these motions, and entering findings of fact and law with respect to both. In addition, we reach no conclusion as to whether the Anti-Injunction Act precludes plaintiff from pursuing the relief sought. *See* 26 U.S.C. § 7421(a).

For the foregoing reasons, we REVERSE and REMAND the decision of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez

A TRUE COPY
Catherine O'Hagan Wolfe, Clerk
by: /s/

[ENTERED: August 4, 2009]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 4th day of August, two thousand and nine.

JONATHAN K. SMITH, A MEMBER OF THE SHINNECOCK INDIAN NATION RESIDING ON THE SHINECOCK INDIAN NATION RESERVATION,
Plaintiff-Appellant,

-v- No. 08-1896-cv

DOUGLAS SHULMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF INTERNAL REVENUE.[1]
Defendant-Appellee.

SHINNECOCK INDIAN NATION,
Interested Party.

Jonathan K. Smith, a member of the Shinnecock Indian Nation residing on the Shinnedock Indian Nation Reservation, having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Commissioner of Internal Revenue Douglas Shulman is automatically substituted for former Commissioner Mark W. Everson as party to this case.

rehearing, and the active members of the Court having considered the request for rehearing *en banc,*

IT IS HEREBY ORDERED that the petition is denied.

For the Court
Catherine O'Hagan Wolfe, Clerk

By: /s/ Frank Perez
Frank Perez, Deputy Clerk

[ENTERED: February 23, 2006]

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JONATHAN K. SMITH, a member of the Shinnecock Indian Nation, residing on the Shinnecock Indian Nation Reservation,	) Case No.:)) Hon.:)
Plaintiff,	)COMPLAINT)
v.	))
MARK W. EVERSON, in his official capacity as Commissioner of Internal Revenue,	))))
Defendant.	))

NOW COMES JONATHAN K. SMIH, PLAINTIFF, by and through counsel, MOORE INTERNATIONAL LAW OFFICES, P.C., and

complains against MARK W. EVERSON, in his official capacity as Commissioner of Internal Revenue, DEFENDANT, and states as follows:

JURISDICTION & VENUE

1. PLAINTIFF, JONATHAN K. SMITH, is a member of the Shinnecock Indian Nation, with residence at Old Pointe Road, Shinnecock Indian Reservation, located within the territorial boundaries of the Town of Southampton, County of Suffolk, State of New York;

2. DEFENDANT is Mark W. Everson, in his official capacity as Commissioner of Internal Revenue, appointed pursuant to Section 7803 of the Internal Revenue Code, with his principal office located at the Internal Revenue Service, 1111 Constitution Ave., NW, Washington, District of Columbia;

3. This court has federal question jurisdiction pursuant to 28 U.S.C. § 1331, and as this action arises under an Act of Congress providing for internal revenue, this court also has original jurisdiction pursuant to 28 U.S.C. § 1340;

CAUSE OF ACTION

4. This cause of action arises out of EVERSON'S assessment of taxes, back-up withholding, and penalties and interest, pursuant to the Internal Revenue Code of 1986, 26 U.S.C. §§ 1, *et seq*, on income earned by SMITH on the Shinnecock Indian Reservation during the year 2000;

5. SMITH filed a Form 1040 for off-reservation earned income for the year 2000 on 15 April 2001, identified by social security number .-7673, with mailing address, P.O. Box 5036, Southampton, NY 11969;

6. Subsequently, SMITH received a back-up withholding tax notice from FirstClearing, LLC, of Glen Allen, Virginia, dated 21 January 2005, stating that SMITH is subject to 28% backup withholding on all cash payment of dividends, interest and original issue discount income in accordance with Section 3406(a)(1)(c) of the Internal Revenue Code, and, through counsel, on 13 June 2005, SMITH filed an objection with the Internal Revenue Service asserting SMITH received no notices of any alleged underreporting, and SMITH disputed any underreporting for the reason that on-reservation earned income is not subject to tax under a treaty guarantee of free trade under the terms of *The Fort Albany Treaty, 1664.*

7. SMITH subsequently received an Internal Revenue Service Notice dated 6 June 2005, that SMITH owed taxes and penalties for the year 2000 in the amount of $128,614.86, and, through counsel, on 17 May 2005, SMITH again filed an objection based on lack of notice and disputed the underreporting with the Internal Revenue Service;

8. SMITH subsequently received a notice of intent to levy from the Internal Revenue Service dated 11 June 2005, and, through counsel, on 21 June 2005, SMITH requested a collection due process hearing, which was granted, and after a

hearing, a determination in favor of the Internal Revenue Service and against SMITH was issued on 25 January 2006;

9. The assessment of tax by EVERSON on income earned by SMITH on the Shinnecock Indian Reservation during the year 2000 is invalid, as in,

A. violation of the treaty guarantee of free trade under the terms of Article 4 and Appended Article 3 of *The Fort Albany Treaty,* 1664, ("Articles between Col. Cartwright and the New York Indians", *Documents Relative* to *the Colonial History* of *the State* of *New York,* III, pp. 67-68) ;

B. violation of the grant of power by the Congress of the United States, pursuant to Section 7801 of the Internal Revenue Code, to the United States Department of the Treasury, to administer and enforce the internal revenue laws of the United States;

C. violation of the policy of the Congress of the United States concerning Indians;

D. violation of the role of the government of the United States of America as trustee and guardian of SMITH;

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, JONATHAN K. SMITH, PLAINTIFF, respectfully prays for the following relief:

10. A declaratory judgment that the tax assessment, and penalties and interest on income earned by SMITH on the Shinnecock Indian Reservation in the year 2000, is invalid;

11. A refund on all back-up withholding collected by EVERSON pursuant to the invalid tax assessment;

12. Any other and further relief to which SMITH may be entitled, including but not limited to, court costs, and reasonable attorney fees.

Dated this 23 day of February, 2006.

/s/ Scott Michael Moore
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Counsel for JONATHAN K. SMITH,
PLAINTIFF

The Fort Albany Treaty, 1664

Articles between Col. Cartwright and the New York Indians.

[New England, I. 207.]

Articles made and agreed upon the 24th day of September 1664 in Fort Albany between Ohgehando, Shanarage, Soachoenighta, Sachamackas of ye Maques; Anaweed Conkeeherat Tewasserany, Aschanoondah, Sachamakas of the Synicks, on the one part; and Colonell George Cartwright, in the behalf of Colonell Nicolls Governour under his Royall Highnesse the Duke of Yorke of all his territoryes in America, on the other part, as followeth, vizt—

1. Imprimis. It is agreed that the Indian Princes above named and their subjects, shall have all such wares and commodities from the English for the future, as heretofore they had from the Dutch.

2. That if any English Dutch or Indian (under the proteccon of the English) do any wrong injury or violence to any of ye said Princes or their subjects in any sort whatever, if they complaine to the Governor at New Yorke, or to the Officer in Cheife at Albany, if the person so offending can be discovered, that person shall receive condigne punishmt and all due satisfaccon shall be given; and the like shall be done for all other English Plantations.

3. That if any Indian belonging to any of the Sachims aforesaid do any wrong injury or damage to the English, Dutch, or Indians under the protection of the English, if complaint be made to y^e^ Sachims and the person be discovered who did the injury, then the person so offending shall be punished and all just satisfaccon shall be given to any of His Ma^ties^ subjects in any Colony or other English Plantacon in America.

4. The Indians at Wamping and Espachomy and all below the Manhatans, as also all those that have submitted themselves under the proteccon of his Ma^tie^ are included in these Articles of Agreement and Peace;

In confirmacon whereof the partyes above menconed have hereunto sett their hands the day and yeare above written

GEORGE CARTWRIGHT

In the presence of *Cawyugo*

T. Willett
John Manning [MARKS]
Tho. Breedon
Dan. Broadhead

{ Smith John
{ his marke

{Stephen an Indian
{ his marke

THESE ARTICLES following wer likewise proposed by the same Indian Princes & consented to by Colonell Cartwright in behalfe of Colonell Nicolls the 25th day of September 1664.

1. That the English do not assist the three Nations of the Ondiakes Pinnekooks and Pacamtekookes, who murdered one of the Princes of the Maques, when he brought ransomes & presents to them upon a treaty of peace.

2. That the English do make peace for the Indian Princes, with the Nations down the River.

3. That they may have free trade, as formerly.

4. That they may be lodged in houses, as formerly.

5. That if they be beaten by the three Nations above menconed, they may receive accommodacon from ye English.

U.S. CONST. ART. I, § 8, Cl. 3 ("The Commerce Clause")

> To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

U.S. CONST. ART. III, § 2, Cl. 1 ("The Cases and Controversies Clause") (in pertinent part)

> The judicial Power shall extend to all Cases, in Land and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ...

N.Y. CONST. ART. I, § 14

[Common law and acts of the colonial and state legislatures]

> § 14. Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the

legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated. (Formerly § 16. Renumbered and amended by Constitutional Convention of 1938 and approved by vote of the people November 8, 1938.)

26 U.S.C. 6320(c)

For purposes of this section, subsections (c), (d) (other than paragraph (2)(B) therof), (e), and (g) of section 6330 shall apply.

26 U.S.C. 6330(d)(1)

The person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

26 U.S.C. 7421(a)

Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c),

6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C. 7422(a)

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

28 U.S.C. 2201

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil

action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.